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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

No. 327.

A. F. RAWLINGS, Receiver of The Lee County National Bank, Marianna, Arkansas, *Petitioner*,

v.

MRS. ELLA M. RAY, *Respondent*.

## REPLY BRIEF ON BEHALF OF PETITIONER.

JOHN C. SHEFFIELD,
*Attorney for Petitioner.*

GEORGE P. BAKER,
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HARRIET BUCKINGHAM,
*Attorneys for the Comptroller of the Currency,*
*Of Counsel.*

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## REPLY BRIEF ON BEHALF OF PETITIONER.

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### I.

### Comments Concerning "Arkansas Decisions" Cited on Page Five of Respondent's Brief.

On page 5 of respondent's brief are cited three Arkansas decisions in support of the doctrine that where a debt is payable on demand it is due immediately and consequently suit may be brought, and the statute of limitations begins to run, at once. We have no quarrel with this general principle, but, as respondent indicates, its application to the instant case is predicated upon the assumption that the petitioner's cause of action accrued on November 6, 1935,—the date the Comptroller levied the assessment. It is there-

fore submitted by petitioner that said cases have no bearing upon the issue here presented of whether the cause of action upon the assessment liability accrued on November 6, 1935, the date of levy, or on December 13, 1935, the date of payment fixed by the Comptroller in the order levying the assessment.

Incidentally, it may be noted that the reporter citation of one of the cases,—*Sturdivant, et al.* v. *McCorley,* is inadvertently given by respondent as 103 S. W. *132,* but the correct page citation is *732.* Respondent quotes, on page 5 of her brief, *the italicized portion only* of the following excerpt from the Court's opinion in that case:

> "As no time was set for the payment, the debt was in law payable on demand. But it does not follow, as counsel for appellee contends, that the statute of limitations did not commence to run until demand was made, for the courts generally hold that *a debt payable on demand is due immediately, so that an action can be brought at any time without any other demand than the suit, and the statute of limitation begins to run at once.*" (Italics inserted)

Attention is invited to the beginning of the quotation: **"As no time was set for the payment, * * *."** This portion of the quotation is of significance in its application to the instant case, in that by the assessment order of November 6, 1935 the "time was set for the payment" of the assessment on or before December 13, 1935. Hence, if the whole quotation from the foregoing case be considered the principle there indicated will support the position of petitioner rather than the position of respondent.

As indicated by the decisions cited on pages 9-10 of petitioner's main brief, the Arkansas doctrine is to the effect that a cause of action does not accrue, and the statute of limitations does not begin to run, until the right to file suit to enforce the cause of action has matured and is available.

On page 8 of petitioner's main brief, under numbered paragraph (2) thereof, decisions of this Court were cited to indicate that it is settled law in the Federal courts that statutes of limitation will not commence to run against a cause

of action until the right to enforce the same by institution of suit has accrued. To the cases there cited may be added: *United States ex rel. Louisville Cement Company* v. *Interstate Commerce Commission* (1918), 246 U. S. 638, 644.

As pointed out on page 9 of petitioner's brief, the decisions of the Federal courts, and the decisions of the Arkansas courts, appear to be in complete accord on this general doctrine.

## II.

### Reply to Argument of Respondent Concerning Long Standing Practice of Comptroller of Currency in Fixing a Future Date for Payment of Assessment.

On pages 11-12 of respondent's brief it is argued, in effect, that the Comptroller of the Currency is without authority to fix a future date for payment of the assessment and that the long standing practice of the Comptroller of the Currency in interpreting the national banking statutes providing for the assessment is not entitled to substantial weight in the construction of these statutes by the courts and in determining the issues involved in the instant case.

On page 12 of petitioner's brief, attention was invited to the fact that it had been the policy and practice of the Comptroller of the Currency since 1888 to incorporate in the order levying an assessment,—specific provisions fixing and prescribing a future date for the payment of the assessment, and the discussion of this practice appears in petitioner's brief, pages 12-18. The statutes creating and providing for the assessment (U. S. C. Title 12, Sec. 63, 64; appendix p. 24, petitioner's main brief) do not fix a time for the payment of the assessment, and from the very nature of things it is obvious that it would have been impracticable to have done so. However, it will be observed that by the Act of June 30, 1876, c. 156, sec. 1, 19 Stat. 63 (U. S. C. Title 12, Sec. 191) and by sec. 5234 R. S. (U. S. C. Title 12, Sec. 192); (appendix pp. 25, 26, petitioner's main brief), Congress did authorize the Comptroller of the Currency to

levy an assessment whenever, in his judgment, such assessment is necessary for the purpose of meeting the debts and obligations of a national banking association in receivership. It seems clear, therefore, that these statutes will not admit of any construction other than that the questions of whether an assessment will be levied at all, and when such assessments shall be paid, must be determined by the Comptroller of the Currency. That such has been the interpretation and construction of these statutes by this court, was indicated in the cases of *Kennedy* v. *Gibson* (1869), 8 Wall. 498, 505, and *Korbly* v. *Springfield Institution for Savings, et al.*, (1917), 245 U. S. 330, 333, cited and quoted on pages 16 and 17 of petitioner's brief. Additional cases to the same effect are:

*Casey* v. *Galli*, (1876) 94 U. S. 673, 677.
*National Bank* v. *Case*, (1878) 99 U. S. 628, 634.
*United States* v. *Knox*, (1880) 102 U. S. 422, 426.
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*Christopher* v. *Norvell*, (1906) 201 U. S. 216.
*Forrest* v. *Jack*, (1935) 294 U. S. 158, 162.

Also see, *Adams* v. *Nagle, et al.*, (1938) 303 U. S. 532, 539, 540.

As pointed out on pages 12-13 of petitioner's main brief, this practice of the Comptroller of the Currency in fixing a future date for payment of the assessment was expressly commented upon with approval by the United States Court of Appeals for the District of Columbia in *Strasburger* v. *Schram*, 68 App. D. C. 87, 89; 93 F. (2d) 246.

It has been stated by this Court from time to time that great weight may properly be given to the settled construction of a statute by the Executive Department charged with its administration, and that such construction should not be overturned unless clearly wrong or unless a different construction is plainly required. *Inland Waterways Corp.* v.

*Young,* (March 25, 1940) 309 U. S. 517, 524-5; *United States* v. *Jackson,* (1930) 280 U. S. 183, 193; *Heath* v. *Wallace,* (1891) 138 U. S. 573, 582; *Brewster* v. *Gage,* (1930) 280 U. S. 327, 336; *Corsicana National Bank of Corsicana* v. *Johnson,* (1919) 251 U. S. 68, 83; *United States* v. *Moore,* (1877) 95 U. S. 760, 763; *United States* v. *Johnston,* (1888) 124 U. S. 236, 253; *Brown* v. *United States,* (1885) 113 U. S. 568, 571; *United States* v. *Finnell,* (1902) 185 U. S. 236, 244.

The language of Mr. Justice Frankfurter in *Inland Waterways Corp.* v. *Young, supra,* (at page 524) is in point:

> "* * * a long continued practice pursued with the knowledge of the Comptroller of the Currency is more persuasive than considerations of abstract conflict between such a practice and purposes attributed to Congress."

The specific issue involved in the instant case, concerning the question of whether the statute of limitations of the particular state starts to run from the date of the order levying the assessment or from the date for payment fixed in said order, was considered in Dickinson Law Review, March, 1940, Vol. XLIV, No. 3 at pages 233-235. The article discussed the decision and opinion of *Reich* v. *Van Dyke,* (C. C. A. 3, 1939) 107 F. (2d) 682, (cited page 19, petitioner's main brief) wherein the Court held that the statute started to run from the date for payment fixed in the assessment order. The author pointed out that the precise issue involved in the *Reich* case (as in the instant case) was not presented in cases such as *Rankin* v. *Barton,* (1905) 199 U. S. 228, and *McDonald* v. *Thompson,* (1902) 184 U. S. 71, although those cases did decide that the statute of limitations does not begin to run in favor of stockholders until their respective liabilities have been determined through an assessment by the Comptroller.

Respondent, in her brief on page 10, refers to and quotes from page 232 of the opinion in *Rankin* v. *Barton, supra,* the language,—"In other words, the liability dates from the order of the Comptroller," and argues on page 11 of her brief, that the statute begins to run from November 6, 1935,

—the date of the order of the Comptroller. Respondent further quotes (respondent's brief, page 13) from *McDonald* v. *Thompson, supra*:

> "In such cases no debt becomes due to the receiver as such until a deficiency has been ascertained and an assessment made, when the statute begins to run." (p. 76 Opinion)

Petitioner submits, in accord with the view taken by the author in Dickinson Law Review, *supra*, said cases of *Rankin* v. *Barton* and *McDonald* v. *Thompson*, establish, in this connection, no more than that the statute of limitations cannot begin to run in favor of the stockholder *prior to* the levy of the assessment by the Comptroller of the Currency, or, restated, cannot begin to run until *after* the levy of the assessment. *This is not the same as holding that the statute begins to run from the date of the order levying the assessment.*

There is, however, language in the opinion (at page 72) of *McDonald* v. *Thompson, supra*, which, although perhaps *dictum*, seems to indicate that the Court did consider that the cause of action on the asssessment therein referred to accrued on the date the assessment was payable:

> "As the cause of action in this case accrued on July 10, 1893, when the assessment was made payable, * * *".

In *McClaine* v. *Rankin*, (1905) 197 U. S. 154, the question presented was which of two sections of the local statute of limitations controlled the time within which suit upon assessment liability of a shareholder of a national bank must be brought. The distinction between the date of assessment, and the date fixed for payment, was not in issue, and hence the language next quoted from the opinion must be considered *dictum*, but it is, nevertheless, perhaps significant as indicating the views of the Court with reference to the date of accrual of the cause of action. The Court said (opinion page 158):

"And as this action was commenced within three years, but not within two years, after the assessment became due and payable, the question is whether subdivision 3 of § 4800 applies."

## III.

## CONCLUSION.

The order of assessment converts the theretofore contingent liability into an absolute liability, but the entire order must be considered and construed in determining the effect thereof in so far as the running of the statute of limitations may be concerned. The portion of the order fixing the future date of payment must be given equal effect with that portion of the order actually levying the assessment. If it be concluded that the Comptroller has the authority to fix a future time for payment of the assessment, it would seem necessarily to follow that the situation is governed by the general doctrine previously discussed (*supra*, pp. 2-3, and petitioner's main brief, pages 8-10) that statutes of limitations will not commence to run against a cause of action until the right to enforce the same by institution of suit has accrued. Obviously, under such circumstances, the stockholder has the full period up to and including the future date fixed for payment by the order, and he cannot be sued until the expiration of such future date followed by default in payment. Hence the statute of limitations will not start to run until such default.

Respectfully submitted,

JOHN C. SHEFFIELD,
*Attorney for Petitioner.*

GEORGE P. BARSE,
LEE ROY STOVER,
HARRIET BUCKINGHAM,
*Attorneys for the Comptroller of the Currency,*

*Of Counsel.*

# NOTICE AND MOTION TO SUBSTITUTE PARTY

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E. B. FUTRALL, Receiver of The Lee County National Bank, Marianna, Arkansas, *Petitioner*,

versus

MRS. ELLA M. RAY, *Respondent.*

## NOTICE AND MOTION TO SUBSTITUTE PARTY.

GEORGE P. BARSE,
*Counsel for Petitioner.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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E. B. FUTRALL, Receiver of The Lee County National Bank, Marianna, Arkansas, *Petitioner*,

versus

MRS. ELLA M. RAY, *Respondent*.

To:

C. E. DAGGETT,
J. B. DAGGETT,
Marianna, Arkansas,
*Counsel for Respondent.*

Sir:

PLEASE TAKE NOTICE that on October 7, 1940, or as soon thereafter as counsel can be heard, the within motion to substitute A. F. Rawlings, Receiver of the Lee County National Bank of Marianna, Arkansas, as Petitioner herein, as successor to and in the place and stead of E. B. Futrall, Receiver of the Lee County National Bank of Marianna, will be submitted to the Supreme Court of the United States.

A copy of the motion to substitute is served upon you herewith.

GEORGE P. BARSE,
Room 309 Treasury Building, Washington, D. C.,
*Counsel for Petitioner.*

Due and timely service accepted
this day of August, 1940.

.....

.....

*Counsel for Respondent.*

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E. B. FUTRALL, Receiver of The Lee County National Bank, Marianna, Arkansas, *Petitioner*,

versus

MRS. ELLA M. RAY, *Respondent*.

---

## MOTION TO SUBSTITUTE PARTY.

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COMES Now, the petitioner in the above entitled cause, and moves that A. F. Rawlings, Receiver of the Lee County National Bank, Marianna, Arkansas, be substituted as petitioner therein in the place and stead of E. B. Futrall, former Receiver of the Lee County National Bank, Marianna, Arkansas, and in support of this motion makes the following brief statement of the matter involved, and the reasons relied upon for the substitution:

I.

This application is made under and pursuant to section 780 of Title 28 U. S. C. (Act of Feb. 13, 1925, c. 229, sec. 11, 43 Stat. 941).

II.

On August 12, 1940, E. B. Futrall, Receiver of the Lee County National Bank, Marianna, Arkansas, by direction of the Comptroller of the Currency, filed in this Court a petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit entered on May 13, 1940. This petition is now pending in this Court.

III.

E. B. Futrall resigned as Receiver of the Lee County National Bank, Marianna, Arkansas, on February 29, 1940, and A. F. Rawlings was appointed as successor Receiver, effective as of the close of business on February 29, 1940, by the Comptroller of the Currency, under the authority contained in sections 191 and 192 of Title 12 U. S. C. (Act of June 30; 1876, c. 156, sec. 1, 19 Stat. 63; sec. 5234 of the Revised Statutes).

IV.

As of the close of business on February 29, 1940, A. F. Rawlings, by virtue of his appointment by the Comptroller of the Currency, assumed and is now performing all of the duties of Receiver of the Lee County National Bank of Marianna, Arkansas, and is the successor in office of E. B. Futrall.

V.

There is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved therein. Under the provisions contained in Sections 63, 64, 191 and 192 of Title 12 U. S. C., A. F. Rawlings, as successor Receiver, is required to collect the assessment levied against the stockholders of the Lee County National Bank of Marianna, Arkansas, and the resignation of E. B. Futrall, as Receiver, in no way renders the issues involved in this cause academic, and has in no way relieved the necessity for a decision by this Court upon the issues involved therein.

VI.

The said A. F. Rawlings has been advised of the making of this motion and has consented thereto.

VII.

Less than six months have expired since the effective date of the resignation of E. B. Futrall.

WHEREFORE, the petitioner prays that A. F. Rawlings, Receiver of the Lee County National Bank of Marianna, Arkansas, be substituted herein as petitioner in the place and stead of E. B. Futrall, former Receiver of the Lee County National Bank of Marianna, Arkansas, and that A. F. Rawlings, as Receiver of the Lee County National Bank of Marianna, Arkansas, be permitted to continue and maintain this cause; and that the title of the cause be amended to read:

"A. F. Rawlings, Receiver of the Lee County National Bank, Marianna, Arkansas, Petitioner,

versus

Mrs. Ella M. Ray, Respondent."

Respectfully submitted,

GEORGE P. BARSE,
*Counsel for Petitioner.*

Dated: August 17, 1940.